1997

State of Utah v. Louis A. Amoroso and beer Across America, an Illinois corporation: Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS 970712-CA

STATE OF UTAH, Plaintiff/Appellant,	:	
	:	Case No. 970712-CA
vs.	:	
LOUIS A. AMOROSO and BEER ACROSS AMERICA, an Illinois Corporation, Defendants/Appellees.	:	Priority No. 15

REPLY BRIEF

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REPLY BRIEF

POINT I

BECAUSE THE MAGISTRATE FOUND NO FACTS BELOW, HIS ORDER IS ENTITLED TO NO DEFERENCE

(Response to Br. Aple. at 3-4, 25-26, 33-35)

The brief of appellees ("BAA") refers to the magistrate's "findings" or to facts that the magistrate supposedly "found" or "found as a matter of fact" or "implicitly found." *See* Br. of Aple. at 4 n.3, 6, 7, 25, 26, 27, 33, 34, 35. On the contrary, the magistrate found no facts below. Hence, this Court owes his Order no deference.

A. The parties agreed that the issue was one of law.

In its memorandum below, the State asserted, "Since these issues are being raised as jurisdictional claims, before trial—or even a preliminary hearing—they are limited to legal issues that can be decided on the pleadings" (R. 70: 325; 71: 340).

BAA replied that its motion to dismiss "states only points of law, supported by undisputed facts" (R. 70: 374):

> *Any facts supporting these arguments are uncontested by the parties.* In these motions, the Defendants rely for factual support only upon the pleadings (Information and Probable Cause Statement) and the discovery provided by the State. We can only assume that these matters are uncontroverted unless the State has intentionally misrepresented its case in those documents or is intentionally withholding information subject to discovery. Hence, *Defendants' entire Motion is "limited to legal issues that can be decided on the pleadings" . . .*

(R. 70: 375) (emphasis added).

B. The magistrate entered no findings of fact.

The magistrate was careful *not* to find any facts. He wrote: "There has not been a preliminary hearing on either case, and no facts have been adduced from any evidentiary submission, but certain facts are set forth in the charging documents, and other facts referred to by both parties in the pleadings provide the necessary factual basis for adjudication of the motions" (Orders on Defendants' Motions to Dismiss and Motion to Quash ["Order"] at 2, addendum B of Br. Aplt.).

In the section of his Order titled "Facts," the magistrate stated, "The court relies on the following facts, which it finds to be undisputed, and all of which are viewed in the light most favorable to the State of Utah, the non-moving party . . ." (*id.* at 3). Indeed, the magistrate expressly refused to rely upon BAA's sales documentation precisely because he felt there was a "factual dispute" regarding it (*id.* at 4).

In the later section entitled "Location of Sale," the magistrate stated: "Place of sale is, however, a critical threshold issue to both the jurisdiction and Commerce Clause/Twenty-first Amendment motions. *This issue is also a matter of law"* (Order at 4, emphasis added). Accordingly, the magistrate resolved the issue "[b]ased on the undisputed facts set forth above, and on the applicable U.C.C. provision" (*id.*). It is thus not the case, as BAA now claims, that the magistrate "*found as a matter of fact* and law that BAA's 'sales all took place in Illinois, where titled passed when the prepaid product was delivered to the shipper.'" Br. Aple. at 25 (emphasis added).

Furthermore, because the magistrate entered no findings, resolved no factual disputes, and limited his analysis to uncontested facts, no factual findings are "[i]mplicit in the magistrate's findings," as BAA now claims. Br. Aple. at 26.

C. No findings were necessary.

Where an evidentiary hearing is held, the proper course is for a trial court to enter findings of facts resolving factual disputes. *See State v. Thurman,* 846 P.2d 1256 (Utah 1993) ("After an evidentiary hearing," court denied the motion to suppress). However, the Rules of Criminal Procedure do not require findings where, as here, no evidentiary hearing is held and the court regards the relevant facts as undisputed.

Rule 12(c), Utah Rules of Criminal Procedure, states, "Where factual issues are involved in determining a motion, the court shall state its findings on the record." The negative pregnant of this sentence is plain: Where no factual issues are involved

in determining a motion, the court need not enter findings. Since, as demonstrated above, the magistrate resolved no factual issues in determining BAA's motion, the magistrate properly entered no findings. *See Taylor v. Estate of Taylor,* 770 P.2d 163, 168-69 n.6 (Utah App. 1989) (findings unnecessary where facts are undisputed).

Nothing in rule 25, Utah Rules of Criminal Procedure, states or implies any other approach. Indeed, rule 25 provides that when the court dismisses an Information on the ground that the court is without jurisdiction, "[t]he reasons for any such dismissal shall be set forth in an order and entered in the minutes." BAA correctly asserts that "[n]othing in that rule prohibits the court from making findings of fact necessary for the order of dismissal." Br. of Aple. at 34. However, nothing in that rule *requires* findings of fact when, as here, the court relies wholly upon facts alleged in the charging documents and uncontroverted facts.

Accordingly, "[t]he State makes no claim that the magistrate improperly proceeded under Rules 12 and 25," Br. Aple. at 34, precisely because the magistrate *properly* proceeded under those rules.

Because the magistrate had no duty to resolve factual disputes and did not do so, this Court is not required to defer to any "findings" of the magistrate, as BAA contends. *See* Br. Aple. at 26.

D. The magistrate presumed the truth of undisputed proffers.

BAA asserts, "Contrary to the State's view, the magistrate . . . was not required to presume as true the prosecutor's proffer concerning the terms of the contract between BAA and its Utah customers." Br. Aple. at 34.

In fact, the magistrate considered the question of proffers and expressly refused to rely on *disputed* proffers: "The court has not considered any factual allegations or proffers which either party has claimed to be in dispute and, consistent with the standard for considering motions to dismiss, all facts considered are viewed by the court in the light most favorable to the State, as the non-moving party" (*id.* at 2).

In its opening brief, the State does rely on a proffer of counsel. *See* Br. Aplt. at 5, 16. For this reason, the State was careful to identify the fact as having been proffered and cite the record page where defense counsel re-characterized, but did not contest, the proffered fact. *See Id.* at 5 n.6. Since this was not a proffer "which either party has claimed to be in dispute," the State properly relies on it.

POINT II

THE STATE'S ARGUMENTS WERE PRESERVED BELOW, BUT ASSUMING ARGUENDO ANY WERE NOT, THIS COURT SHOULD NEVERTHELESS REACH THEIR MERITS

(Response to Br. Aple. at 7-15)

The State's arguments were all preserved or arguably preserved below. If any were not, they should nevertheless be entertained because of the posture of this case.

A. The State's challenge to the magistrate's exclusive reliance on locus-of-sale is preserved.

BAA claims that in the magistrate's court "the State, along with BAA, framed the issues in such a way that situs of the transaction between BAA and a Utah purchaser was a critical threshold question." Br. Aple. at 8.

On the contrary, the State argued that the jurisdictional issue was governed by the Utah criminal jurisdiction statute, UTAH CODE ANN. § 76-1-201 (R. 70: 327-28). That statute "requires that the crime being alleged occurred, in whole or in part, in this state" (R. 70: 329; 71: 345). If this requirement is met, the State argued, "the Utah courts have criminal jurisdiction" (R. 70: 328; 71: 344).

In support of this position, the State cited UTAH CODE ANN. § 32A-12-503, noting that it "makes 'shipping or transporting or causing to be shipped or transported' an element of the crime"; UTAH CODE ANN. § 32A-12-201, noting that it "makes 'selling, offering to sell, soliciting, or furnishing or supplying' an element of the offense"; UTAH CODE ANN. § 32A-9-101(2), noting that it prohibits "'[d]istribution or transportation' of alcoholic beverages"; and UTAH CODE ANN. § 32A-12-203, noting that it "contains as an element the furnishing of alcohol to a minor in this state" (R. 70: 331, 71: 347). Hence, the State argued, "If the deliveries, furnishing, or transportation occurs in Utah, the State has jurisdiction and due process is satisfied" (R. 70: 331, 71: 347).

In discussing the Twenty-first Amendment, the State argued that when defendants "undertake to furnish their product to customers in this state, arrange shipping into the state, and carry on marketing efforts directed at the state, they are subject to the alcoholic beverage laws of Utah" (R. 70: 336; 71: 352).

In oral argument, the prosecutor did not rely on place of sale or passage of title, but argued that "when the alcohol passes the state borders, then Utah law applies. Under the 21st Amendment, the State of Utah has the right to control what alcohol comes into the state" (R. 753). After the magistrate expressed an inclination to apply the UCC definition of "sale," the prosecutor argued that even under the UCC, jurisdiction was proper in this case (*see* R. 753-56). But he quickly returned to the State's contention that "the defendants engaged in conduct in Illinois and in Utah directly and through agents that had the effect of violating Utah criminal laws" (R. 757). This argument does not rely on the question of where title passed or where sales were consummated as a matter of law, but the fact that "solicitations were made in Utah. Orders were accepted from Utah for shipments into this state. Hundreds of shipments were delivered into Utah by the company['s] shippers . . . [T]here are many crimes where the agreement may be made in some other state, and an element of it occurs here and that is enough" (*id.*).

The record thus rebuts BAA's claim that the State's "theory below clearly hung on there having been a sale and that the sale occurred in Utah." Br. Aple. at 11.

B. The State preserved its argument that the sale of alcohol was only one of many acts with which BAA was charged.

BAA claims that the State failed to preserve its claim that the charges were not limited to sale. Br. Aple. at 10-11.

As noted above, the State pointed out to the magistrate that section 32A-12-503 "makes 'shipping or transporting or causing to be shipped or transported' an element of the crime"; that section 32A-12-201 "makes 'selling, offering to sell, soliciting, or furnishing or supplying' an element of the offense"; that section 32A-9-101(2) prohibits "'[d]istribution or transportation' of alcoholic beverages"; and that section 32A-12-203, "contains as an element the furnishing of alcohol to a minor in this state" (R. 70: 331, 71: 347). Hence, the State argued below, "If the deliveries, furnishing, or transportation occurs in Utah, the State has jurisdiction and due process is satisfied" (*id.*; *see also* R. 764). This is the argument that the State asserts on appeal. *See* Br. Aplt. at 13-14.

BAA cites the following statement from the State's trial memorandum: "If defendants had not shipped alcoholic beverages into the state, there would be no crime in Utah." Br. Aple. at 11 (citing R. 71: 347). BAA characterizes this argument as depending upon the legal question of where title passed. *See id.* It does not. The argument depends rather on the factual question of whether, as a result of BAA's conduct, beer physically crossed Utah's borders.

Moreover, even if the State had not made this argument below, the issue is nevertheless preserved for appeal by the magistrate's own ruling. He drew this very distinction in ruling on the furnishing-alcohol-to-a-minor count. The magistrate refused to dismiss the charge of sale to a minor, since that count alleged "that defendants either sold or offered alcohol for sale to a minor," and therefore, even if title passed in Illinois, "the State could still prevail by proving that an offer occurred in Utah" (R. 70: 693; 71: 594). However, the charges the magistrate dismissed also alleged conduct other than sale: shipping, transporting, or furnishing alcohol (Count I), furnishing or supplying alcohol (Count II), and distributing or transporting alcohol (Count III) (R. 70: 282-87; 71: 297-302).

The purpose of the preservation requirement is to require the parties to "bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits." *Ohline Corp. v. Granite Mill,* 849 P.2d 602, 604 n.1 (Utah App. 1993) (citations omitted). The magistrate invoked the distinction between sales and other prohibited activities in the context of the charge involving a minor. This action demonstrates that he had the opportunity to apply the same analysis to the remaining charges and yet chose not to do so.

C. The State's challenge to the magistrate's reliance upon the UCC definition of *sale* is (1) arguably preserved, (2) does not need to be preserved, or (3) is reviewable under the plain error standard.

1. This claim was arguably preserved.

BAA claims that the State failed to preserve its argument that the magistrate should have applied the definition of sale found in the Alcoholic Beverage Control Act ("ABCA") rather than the definition in the UCC. Br. Aple. at 12. In fact, BAA argues that the State committed invited error because the magistrate's reliance upon the UCC definition of "sale" is "attributable to the State." *Id.*

In support of this argument, BAA argues that, "when asked by the magistrate to address the situs-of-sale issue, the prosecutor offered only the UCC provision (§ 70A-2-401) as authority for deciding that issue. He never mentioned section 32A-1-105(47)." *Id.*

The prosecutor below never affirmatively suggested that the UCC definition was controlling. In the State's memorandum in opposition, the prosecutor did not mention the UCC definition of "sale" for which BAA argued, but cited to section 59-7-318, a tax definition (*see* R. 70: 336; 71: 352). The prosecutor argued that "all of defendants' arguments about the transaction taking place in Illinois are beside the point. The delivery does take place in Utah; therefore, Utah law applies" (*id.*).

In oral argument, the prosecutor did not "offer" the UCC provision, but was asked why he disagreed "with the UCC position the contractual position that way title

passes in Illinois? [sic]" (R. 753-54). At that point, the prosecutor explained why, even under the UCC definition, the sale legally occurred in Utah (R. 754-55; *cf.* Br. Aplt. at 15-16).

Thus, looking both to the State's memorandum and to oral argument, the prosecutor argued in substance that (1) the UCC definition did not apply; and (2) in any event, properly applied, even under the UCC definition of "sale," the sales at issue in this case occurred in Utah. Accordingly, notwithstanding BAA's correct observation that the State did not bring to the magistrate's attention the definition found in the ABCA, the argument made by the State arguably preserved all of the State's arguments.

2. Even if unpreserved, this claim is reviewable because it raises a jurisdictional issue.

This Court may also reach the merits of this legal issue because it is one of jurisdiction, and "issues of jurisdiction can be raised at any time, in any forum." *State v. Clark,* 913 P.2d 360, 362 (Utah App. 1996) (citing *State v. Brooks,* 908 P.2d 856, 859 (Utah 1995)); *State v. Perank,* 858 P.2d 927, 930 (Utah 1992) ("the issue of subject matter jurisdiction can be raised at any time"). Admittedly, this case presents an unusual application of this rule, since the appellant asserts the existence of jurisdiction, not the lack of jurisdiction. However, the underlying policy is equivalent: it is just as fundamental an injustice for a court having jurisdiction to refuse to exert it as for a

court lacking jurisdiction to exert it. This Court should therefore consider this jurisdictional issue irrespective of whether it was preserved below.

3. This claim is reviewable under the plain error standard.

In the alternative, the Court should consider this claim under the doctrine of plain error. The State recognizes that an appellant may not raise an "entirely new argument" in its reply brief. *State v. Brown,* 853 P.2d 851, 854 n.1 (Utah 1992). To permit this would reward the appellant for the omission and bestow the "opportunity to present an unopposed analysis." *Id.* Here, however, the State is not raising an "entirely new argument." Furthermore, no prejudice will result here in view of BAA's request for an "opportunity to submit additional briefing" in the event "the Court is inclined to address the merits of any of the State's unpreserved arguments." Br. Aple. at 15. Thus, if this Court decides to review this issue under plain error analysis, it may accord BAA the opportunity to supplementally brief the applicability of UTAH CODE ANN. § 32A-1-105(47) as raised on pages 14-15 of the State's opening brief.

Where, as here, any possible prejudice to BAA may be cured with supplemental briefing, reviewing this issue under a plain error standard would serve the interests of justice. This request certainly falls short of asking this Court to reach "an issue that was not raised by either party before the trial court, and was not briefed or argued before this court," although on occasion even this occurs. *Thurston v. Box Elder County,* 835 P.2d 165, 170 (Utah 1992) (Zimmerman, C.J., dissenting).

The magistrate's failure to apply the correct statutory definition of sale was plain error. To demonstrate plain error, an appellant must show that (1) an error was committed; (2) the error should have been obvious to the trial court; and (3) the error was prejudicial. *State v. Dunn,* 850 P.2d 1201, 1208-09 (Utah 1993).

The magistrate determined the meaning of *sale* as that term is used in the ABCA. Section 32A-1-105(47) of that Act defines the term *sale* "[a]s used in this title." Therefore, to ignore this definition and apply instead a UCC definition of *sale* was obvious error.

The error was also prejudicial. The magistrate's entire decision turned on his ruling that "the sales all took place in Illinois, where [according to the UCC] title passed when the prepaid product was delivered to the shipper" (R. 70: 687; 71: 588).

ABCA defines *sale* to include "any transaction . . . whereby, for any consideration, an alcoholic beverage is either directly or indirectly transferred, solicited, ordered, delivered for value, or by any means or under any pretext is promised or obtained, whether done by a person as a principal, proprietor, or as an agent, servant, or employee." UTAH CODE ANN. § 32A-1-105(47) (1994).

Had the magistrate focused on whether any part of the transfer, solicitation, order, or delivery of alcoholic beverages occurred in Utah, he must necessarily have concluded that the prohibited acts occurred at least in part in this state and, consequently, that BAA was subject to jurisdiction here.

D. The magistrate's failure to recognize that BAA's physical presence in court conferred personal jurisdiction was plain error.

In its opening brief, the State asserted that the magistrate committed plain error in failing to recognize that the presence of the defendants in court conferred jurisdiction over their persons. Br. Aplt. at 19-22. BAA argues that this plain-error argument fails because any error cannot have been obvious to the magistrate. Br. Aple. at 13.[1]

The magistrate's error cannot have been obvious to him, BAA argues, because only one Utah case appears "in the long list of cases the State cites for the proposition that a criminal defendant's mere presence in court confers personal jurisdiction . . ." *Id.* This argument assumes that an error cannot be obvious absent a Utah case on point. That assumption is not entirely correct.

In *State v. Ross,* 951 P.2d 236 (Utah App. 1997), this Court looked to foreign as well as Utah precedent in determining whether failing to give a limiting instruction under particular circumstances constituted plain error. The Court stated, "There is no Utah law requiring a limiting instruction in these circumstances, and certainly none holding that failure to give such an instruction is plain error. Utah courts have repeatedly held that a trial court's error is not plain where there is no settled appellate law to guide the trial court." *Id.* at 239 (citations omitted). However, the Court continued, "Furthermore, *other jurisdictions have reached no consensus* on when a trial court's

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[1] BAA does not challenge the other two prongs of the plain error doctrine, i.e., that the magistrate committed error, and that the error was prejudicial. *See* Br. Aple. at 13.

failure to [instruct] will be reversed as plain error." *Id.* (emphasis added). In short, the requirement is "settled appellate law," which may be shown either by reference to Utah law or to a consensus of other jurisdictions.

The authorities cited on pages 19 to 21 of the State's opening brief establish that the law on this issue is settled. Where, as here, (1) American jurisdictions are virtually if not literally unanimous, and (2) the principle at stake is rudimentary, this Court may with confidence declare it "settled appellate law." Accordingly, the magistrate's error was obvious.[2]

Furthermore, even if the magistrate's error was not plain, it is reviewable as an issue of jurisdiction, raisable at any time. *See Clark,* 913 P.2d at 362.

E. Because the State can refile charges in the event of a reversal on jurisdictional grounds, justice will be served by this Court reaching the merits of the arguments before it.

Prior to the preliminary hearing, the magistrate dismissed this prosecution for lack of jurisdiction under rules 12 and 25, Utah Rules of Criminal Procedure (Order at 1-2). Such a dismissal is without prejudice to the State's refiling charges. *See* Utah R. Crim. P. 25(d) ("If the dismissal is based upon the grounds that . . . the court is without jurisdiction . . . further prosecution for the offense shall not be barred").

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[2] *Washington v. Renouf,* 5 Utah 185, 299 P.2d 620 (1956), holds that a Utah court has jurisdiction over a criminal defendant illegally brought here from another state, but detained here "under legal process." 299 P.2d at 621. Thus, although it does not clearly state the consensus rule, it necessarily presumes it.

Thus, should this Court affirm the magistrate's order without reaching potentially dispositive arguments, the State is entitled to refile the charges, and if BAA again claims lack of jurisdiction, to advance the arguments BAA now claims are waived.

Where dispositive issues are likely to arise later in the course of a judicial proceeding, appellate courts are sometimes address them "in the interest of judicial economy and providing guidance to the parties and the trial court . . ." *State v. Fisk,* No. 971462, slip op. at 2 (Utah App. Oct. 8, 1998) (addressing merits of issues likely to arise in future appeal notwithstanding court's lack of jurisdiction).

POINT III

UTAH'S CRIMINAL JURISDICTION STATUTE CLEARLY EMBRACES BAA'S CONDUCT AFFECTING THE STATE OF UTAH

(Response to Br. Aple. at 37-46)

As framed by BAA in the magistrate's court, this case was about two things: first, the necessity to apply civil long-arm minimum-contacts analysis in criminal cases; and second, interstate Internet use. In its reply memorandum in the magistrate's court, BAA summarized its legal position by arguing that, "[d]espite the State's attempt to confuse the issues, two principles remain clear":

> First, the Court has no due process jurisdiction over Defendants. When statutes, such as contained in Utah's Alcoholic Beverage Control Act, provide both civil and criminal enforcement mechanisms, both criminal and civil due process jurisdiction must exist over defendants before criminal jurisdiction can be exercised. *Since long arm jurisdiction does not exist, criminal jurisdiction cannot exist . . .*

(R. 70: 387) (emphasis added). Indeed, BAA even persuaded the magistrate that the State may not criminally prosecute defendants if the State "cannot successfully assert jurisdiction under the civil standard" (Order at 5-6).

On appeal, BAA abandons this issue, claiming cursorily that it is "not as easily resolved as [the State] would have this Court believe," but asserting that this Court "need not decide that issue" in order to affirm the magistrate. Br. Aple. at 36-37.[3] BAA instead relies wholly upon its argument that "the State cannot prevail under the criminal jurisdiction statute it contends governs this case." Br. Aple. at 37.[4]

A. Utah's criminal jurisdiction statute is not limited to crimes where the actor's conduct must produce a specific result.

1. This issue was preserved below.

BAA's claim that the State failed to preserve the "result" or "effects" theory is not well taken. *See* Br. Aple. at 38. The prosecutor argued the "effect" theory

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[3] Despite its claim that this issue is not easily resolvable, BAA does not question Professor Brilmayer's research, which failed to uncover "any criminal case applying minimum contacts analysis." LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 329 n.39 (1986).

[4] BAA thus effectively acquiesces in the State's framing of this issue below: "If the [Utah criminal jurisdiction statute's] requirements are met, the Utah courts have criminal jurisdiction. There is no need to conduct a separate inquiry to ensure that the conduct also meets the standards for civil jurisdiction under the Utah Long Arm Statute" (R. 70: 328, 71: 344) (citation omitted).

below (*see* R. 757-58)[5] and informed the magistrate that the State was relying upon subsection (1)(a) of section 76-1-201 as defined by subsection (2) thereof (R. 758), the same subsections quoted in the State's opening brief. *See* Br. Aplt. at 28.

In addition, the State's memorandum quoted the following language from *Strassheim v. Daily,* 221 U.S. 280, 285, 31 S. Ct. 558, 560 (1911): "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power" (R. 70: 333, 71: 349). It also quoted the following language from *United States v. Nippon Paper Indus. Co., Ltd.,* 109 F.3d 1 (1st Cir. 1997), *cert. denied,* 118 S. Ct. 685 (1998): "a sovereign ordinarily can impose liability for conduct outside its borders that produces consequences within them" (R. 70: 333; 71: 349). Both cases are cited in the State's opening brief. *See* Br. Aplt. at 27.

In view of the foregoing, to say that "the prosecutor made a passing reference to the 'result' theory," Br. Aple. at 38, is inaccurate. The issue is preserved.

2. BAA's formalistic reading of the criminal jurisdiction statute is unpersuasive.

BAA argues for the first time on appeal that the reach of the result prong of Utah's criminal jurisdiction statute is limited to crimes that "are so worded that a bad

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[5] In several instances, the court reporter mistakenly rendered the word *effects* as *defects* (*see* R. 757). The error is apparent in context.

result is needed for commission of the crime." Br. Aple. at 40 (citation omitted). Thus, according to BAA, the statute cannot apply to a crime that "contains only prohibited conduct . . . [but] does not include any prohibited result." Br. Aple. at 41. BAA's argument fails for at least four reasons.

First, nothing in the statute itself implies a such drastic limitation. UTAH CODE ANN. § 76-1-201 (Supp. 1997) provides in pertinent part:

> (1) A person is subject to prosecution in this state for an offense which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if:
>
> (a) the offense is committed either wholly or partly within the state;
>
> . . .
>
> (2) An offense is committed partly within this state if either the conduct which is any element of the offense, or the result which is such an element, occurs within this state.

For subsection (2) to apply, all that is required is for any element of the offense to occur within the State of Utah; whether that element *is* the defendant's conduct or *results* from the defendant's conduct is of no moment. *See State v. Coando,* 784 P.2d 1228, 1230 (Utah App. 1989). Nothing in the statute suggests that it was intended to except crimes that are not "so worded that a bad result is needed for commission." Br. Aple. at 40 (citation omitted).

Second, BAA's argument relies on the coincidence that the word *result* can carry at least two different meanings in this context. The passage from LaFave and Scott quoted by BAA divides criminal elements into those defined in terms of a perpetrator's

conduct and those defined in terms of its consequence. *See* Br. Aple. at 39-40. Under this distinction, *result* refers to an element of the latter type.

However, the jurisdiction statute divides criminal elements into those committed within the state and those caused by out-of-state actors. Under this distinction, *result* refers to *"any* element" of the crime caused by an out-of-state actor. In other words, criminal conduct, as well as its consequence, may be a *result* for purposes of the jurisdiction statue if it was caused by an out-of-state actor.

Third, BAA's construction of this statute would yield absurd and disastrous results. For example, under our bribery statute, it is not a defense that "the person sought to be influenced did not act in the desired way." UTAH CODE ANN. § 76-8-103(2)(b) (Supp. 1998). Thus, no element of the crime specifies any particular consequence. Accordingly, under BAA's theory, Utah would be unable to prosecute one who carried on a lively business of bribing Utah officials, so long as he never came within the state's borders to do it.

Utah drug statutes provide another example. With certain exceptions, it is unlawful "for any person to knowingly and intentionally . . . distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance." UTAH CODE ANN. § 58-37-8(1)(a)(ii) (Supp. 1998). No particular result

is required.[6] Thus, under BAA's reading of the our statute, the State of Utah would have no jurisdiction over an Illinois resident who shipped drugs into this state.

Statutes should be construed to avoid such absurd results. *State v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988) ("It is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result."). This is especially so where, as here, the Court's construction of the statute has potentially sweeping implications.

Fourth, BAA's construction has no case support. Utah's statute is not unique; at least one other state—Illinois—has the identical provision, *see* Ch. 720 ILL. COMP. STAT. 5/1-5 (1993), and other states have substantially identical provisions. *See, e.g.*, FLA. STAT. ch. 910.005 (1997); IOWA CODE § 803.1 (1994); MONT. CODE ANN. § 46-2-101 (1997); N.H. REV. STAT. ANN. § 625:4 (1996); TEXAS PENAL CODE ANN. § 104(a)(1) (1994). Yet BAA cites no case, and the State is aware of none, containing any language supporting BAA's formalistic statutory construction.

BAA's home state of Illinois certainly does not curtail the reach of its identical statute. *See People v. Govin,* 572 N.E.2d 450, 452-54 (Ill. App.) (drug dealing charges were properly brought in Illinois against a Florida man for providing the name of his

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[6] Only one of four drug crimes defined in section 58-37-8(1)(a) includes a result element. *See* UTAH CODE ANN. § 58-8-(1)(a)(iv) (continuing criminal enterprise).

drug supplier to an Illinois customer, who called the supplier, who in turn shipped cocaine into Illinois), *appeal denied* 580 N.E.2d 124 (Ill. 1991).

For the foregoing reasons, BAA's interpretation of the Utah criminal jurisdiction statute should be rejected.[7]

B. BAA concedes that its conduct/result distinction is irrelevant to Count I.

Count I of the Information charges BAA with violation of UTAH CODE ANN. § 32A-12-503 (1994) (R. 70: 282-87; 71: 297-302), which makes it "unlawful for any . . . person, to ship or transport or *cause to be shipped or transported* into this state . . . any alcoholic product, or to . . . furnish any alcoholic product to any person within this state . . ." (emphasis added). BAA concedes that this language "appears to define a prohibited result," thus satisfying even BAA's narrow reading of the Utah criminal jurisdiction statute. Br. Aple. at 44-45.

BAA is thus forced to fall back on its argument that the State failed to preserve the argument that BAA's extraterritorial conduct caused an unlawful result in Utah. *Id.* As demonstrated in Point II.A. above, the State preserved this claim. Accordingly,

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[7] Considering the formalistic nature of BAA's argument, the fact that BAA did not raise it below, and BAA's failure on appeal to cite any case adopting it, the State's failure to anticipate this argument before the magistrate is not "inexcusable," as BAA charges. Br. Aple. at 45. Of course, as appellee, BAA is permitted to seek affirmance on any proper ground supported by the record. *See State v. South,* 924 P.2d 354 (Utah 1996).

even under BAA's flawed construction of Utah's criminal jurisdiction statute, jurisdiction is proper on Count I.

POINT IV

THE CHARGED CONDUCT SUPPORTS THE CHARGE ASSERTED IN COUNT III

(Response to Br. Aple. at 41-42)

BAA advances an alternative ground to affirm the dismissal of Count III. BAA asserts that the charging documents "do not allege any facts that would support a finding that BAA engaged in warehousing, distributing, or transporting liquor within Utah for resale to a wholesaler or retailer." Br. Aple. at 41.

This statement is factually true: BAA is not accused of having transported liquor for resale to a *retailer*. But that is not what the applicable statute requires. Count III alleges a violation of UTAH CODE ANN. § 32A-1-101(2) (1994) (R. 70: 282-87; 71: 297-302). That section provides in pertinent part: "A person may not warehouse, distribute, or transport liquor for resale to wholesale or *retail customers* unless the person is issued a warehousing license by the commission." (emphasis added). BAA is not a brewer. Brewers sell beer to BAA, which then *resells* and transports that beer to *retail customers*. BAA thus "transport[ed] liquor for resale to . . . retail customers" in Utah. *Id*. Court III was validly charged.

POINT V

BAA'S SUGGESTION THAT THE STATE OF UTAH MAY PROSECUTE ITS UTAH CUSTOMERS IS IRRELEVANT TO THIS CASE EXCEPT INSOFAR AS IT INCRIMINATES BAA

(Response to Br. Aple. at 46-47)

BAA asserts that even if Utah cannot prosecute BAA for violation of its liquor laws, it can nevertheless prosecute BAA's Utah customers. *See* Br. Aple. at 46-47.

Though irrelevant standing alone, this assertion is interesting because it constitutes a concession that BAA's customers violated Utah law. This concession is relevant in view of the statute providing that "[e]very person, acting with the mental state required for the commission of an offense . . . who . . . intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." UTAH CODE ANN. § 76-2-202 (1995). By knowingly delivering beer to an Illinois shipper with instructions to deliver it to Utah customers, BAA intentionally aided Utah residents to engage in what BAA now acknowledges is criminal conduct. It thus violated section 76-2-202.

Whether the Information in its present form is sufficient to charge BAA with violation of section 76-2-202 remains to be seen. *See* Utah R. Crim. P. 4(b); *State v. Johansson,* 680 P.2d 25, 26-27 (Utah 1984).

CONCLUSION

The magistrate's order of dismissal should be reversed as to all counts and the case remanded for further proceedings.

RESPECTFULLY submitted on 30 October 1998.

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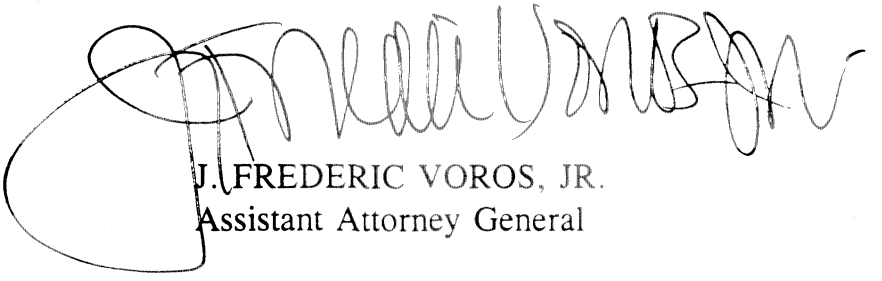

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellant were mailed by first-class mail this 30 October 1998 to each of the following:

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